

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

**HERMAN NOAH -
TOWNHOUSES, LTD., &
HUMAN DEVELOPMENT COMMUNITY
DEVELOPMENT CORPORATION,**

Respondents.

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**DOCKET NO. 08-3472-DB
DOCKET NO. 08-3473-DB
DOCKET NO. 08-3474-DB**

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By separate Notices dated November 15, 2007 ("Notices"), the Department of Housing and Urban Development ("HUD") notified Respondents HERMAN NOAH, TOWNHOUSES, LTD., AND HUMAN DEVELOPMENT COMMUNITY DEVELOPMENT CORPORATION (HDCDC) that HUD was proposing their debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a three-year period from the date of the final determination of this action. The Notices further advised Respondents that the proposal to debar them was in accordance with the procedures set forth in 24 CFR part 24¹. In addition, the Notice informed Respondents Noah and HDCDC that their proposed debarment was based upon violations of HUD requirements regarding their ownership and management of two HUD/FHA insured multifamily projects, Wellstone Townhouses and HDC Retirement Village. The Notice to Townhouses informed it that its proposed debarment was based upon the same violations regarding its ownership of the two aforementioned properties.²

¹ HUD published a final rule on December 27, 2007 (72 FR 73484) that relocated and recodified 24 CFR part 24 as 2 CFR part 2424. HUD's December 27, 2007, rule stated that the rule "adopts, by reference, the baseline provisions of 2 CFR 180 "the government-wide rule published by OMB on August 31, 2005 (70 FR 51863) setting forth guidance for agencies with respect to nonprocurement debarment and suspension. However, because this matter arose before publication of HUD's final rule, for the convenience of the reader, references herein will be to the regulations in their former location at 24 CFR part 24.

² In Respondent's Brief filed on May 13, 2008, counsel for Respondents represent that Townhouses and HDCDC "are no longer operating legal entities." No documentation from the State was submitted to verify

In summary and in pertinent part, the Notices allege that Townhouses, Ltd. (Townhouses) owned Wellston Townhouses (Wellston). In December 1978, Townhouses executed a Regulatory Agreement with HUD that covered program operations at Wellston. HDCDC was the General Partner of Townhouses and until March 2005 was also the management agent for Wellston. In March 1990, HDCDC had executed a Housing Management Agreement with Townhouses that required HDCDC to comply with the Wellston Regulatory Agreement. During a review on April 25, 2003, the Missouri Housing Development Commission (MHDC), HDCDC's mortgage holder, rated HDCDC below average. HDCDC appealed the rating, which was subsequently upheld by HUD. In a January 27, 2004, notice upholding the rating, HUD reiterated its demand that Townhouses replace HDCDC as its management agent with a professional, independent management agent by March 1, 2004. Townhouses did not replace HDCDC until March 2005. The Notices charge that the failure to provide management acceptable to the Secretary violated paragraph 12 (a) of the Wellston Regulatory Agreement.

The Notices further allege that distributions from Wellston project funds, during a time when Wellston was in a negative cash flow position, were made by Townhouses to pay management fees to HDCDC and to pay water service for another project. These payments, the Notices charge, violated paragraphs 8(b) and (e) of the Regulatory Agreement. Additionally, the Notices charge that Townhouses and HDCDC violated paragraphs 8(g) and 5(b) of the Regulatory Agreement by failing to keep tenant security deposit accounts for Wellston funded to levels required by HUD and by retaining rent payments that exceeded those required by the Housing Assistance Payments (HAP) Contract.

The Notices to Respondents Noah and HDCDC also allege that in April 1990, HDCDC, the owner and management agent for HDC Retirement Village, entered into a Regulatory Agreement with HUD that governed program operations at HDC Retirement Village. In April 1990, HDCDC executed a Management Certification for Owner-Managed Properties with HUD by which HDCDC agreed to comply with the Regulatory Agreement. The Notices charge that HDCDC, in violation of paragraph 8(g) of the Regulatory Agreement, failed to keep the tenant security deposits funded to levels required by HUD. The Notices also allege that HDCDC transferred to Wellston in fiscal year 2004, \$4,229.00 of Retirement Village funds when Retirement Village and Wellston were in a negative cash flow position. These transfers, the Notices charge, were not authorized by the Secretary and violated paragraphs 8(b) and (e) of the HDC Retirement Village Regulatory Agreement.

these entities' status as defunct or dissolved. It is noted, however, that the allegations against the three Respondents are almost the same, except where their status (e.g., owner) results in additional allegations (e.g., imputation) against a Respondent. In any event, this Determination will continue to address the charges as they were preferred against all three Respondents, with the understanding that, based on counsel's representation, Respondent Noah is the only viable Respondent. Additionally, an understanding of Respondent Noah's role will perforce require reference to all three Respondents.

In the case of Respondent Noah, the Notice to him advised that as President of NDCDC during the time of the alleged violations by HDCDC, the violations are imputed to him pursuant to 2 CFR 180.630(b) (formerly 24 CFR 24.630(b)). The Notice to HDCDC advised that, as the general partner of Townhouses, the acts and omissions of Townhouses are imputed to HDCDC. Also, Respondent Noah and the two other Respondents were advised that the activities described in the respective Notices showed that they were involved in covered transactions. The Notices further charge that the Respondents' actions are evidence of serious irresponsibility and are cause for debarment in accordance with 2 CFR 180.800(b) and (d).

A telephonic hearing on Respondents' proposed debarment was held in Washington, D.C. on April 30, 2008,³ before the Debarring Official's Designee, Mortimer F. Coward. Respondent participated by phone at the hearing along with his attorney, Donnell Smith, Esq. Stanley Field, Esq. appeared on behalf of HUD. The record was kept open for the parties to submit post-hearing submissions and closed on June 4, 2008.

SUMMARY

I have decided, pursuant to 2 CFR part 180, to dismiss the proposed debarment against Respondent Noah, and to debar Respondents HDCD and Townhouses, Ltd. from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government, for a period of three years from the date of this determination. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The respective Notices of Proposed Debarment dated November 15, 2007.
- (2) The Government's Pre-Hearing Brief in Support of a Three-Year Debarment filed February 22, 2008 (including all attachments and exhibits thereto).
- (3) Respondent's Brief filed May 13, 2008 (including all attachments and exhibits thereto).
- (4) The Department's Post-Hearing Brief filed June 4, 2008.
- (5) The digital recording of the April 30, 2008, hearing.

GOVERNMENT COUNSEL'S ARGUMENTS

Government counsel reiterates in more detail the allegations recited in the Notices. Specifically, Government counsel notes the below average rating received by Wellston in the Management and Occupancy Review conducted by MHDC. As alluded to above, in a letter dated September 12, 2003, HUD notified Townhouses, the owner of Wellston, that it had thirty days to replace Wellston's identity of interest management agent, HDCDC. HDCDC was unsuccessful in its appeal of HUD's September 12, 2003, decision. In the January 27, 2004, denial of HDCDC's appeal, HUD ordered that

³ This matter was originally set for hearing on March 12, 2008, and April 9, 2008, but continued because of the unavailability of Respondents' counsel.

Wellston be under new management by March 1, 2004. However, HDCDC did not replace itself as management agent until March 1, 2005. At that time, Respondent Noah executed a management contract with Majestic Management, LLC on behalf of Townhouses, Ltd.

Government counsel also raised other violations committed by Respondents, including payment of unearned management fees of \$5453.00 in FY 2003 to HCCDC by Townhouses, through its general partner, HDCDC, from Wellston's funds. Wellston was in a negative cash flow position at the time the fees were paid. Counsel contends that the fees were booked as a receivable to Wellston reimbursable by HDCDC. However, a review of Wellston's books for FY 2005 shows that the receivable of \$5453.00 has yet to be collected. The payment of these fees was a violation of paragraph 8(b) of the Regulatory Agreement, counsel argues, because it was not a reasonable operating expense.⁴ Similarly, Government counsel argues that Townhouses payment of the water bills for Grandview Apartments from Wellston funds was a violation of paragraph 8(b) of the Regulatory Agreement. The payment "was not for a business expense [Wellston] owed." Counsel argues that Townhouses committed a further violation of its Regulatory Agreement in that it failed to keep its tenant security deposit account for Wellston fully funded. A review of Wellston's books shows that as of December 31, 2005, the Tenant Security Deposit Account had a balance of \$121.60 while the corresponding liability showed a balance of \$12,177.52 – an underfunding of the deposit account by \$12,055.92.⁵ Counsel also argues that Townhouses violated the HAP Contract by retaining rent payments from tenants that exceeded the amount owed Wellston under the Contract. Wellston carried on its books twenty-six tenants owed \$3167.60 in prepaid rent, according to Government counsel.

Government counsel also charges that HDCDC, the owner of HDC Retirement Village, violated paragraph 8(g) of its Regulatory agreement by withdrawing in November 2007 \$7000.00 from HDC Retirement Village Tenant Security Deposit Account for deposit to HDC Retirement Village Rental Account.⁶

HDCDC is further charged by Government counsel with violating paragraph 8(b) of its Regulatory Agreement by transferring in May 2004 \$4,229.00 of HDC Retirement Village funds to Wellston when Village was not in a surplus cash position. Counsel argues that the audited financial statement for FY 2004 for Village shows that it had a

⁴ See Gov't Ex. 2. Paragraph 8(b) provides that "Owners shall not without the prior written approval of the Secretary . . . (b) Assign, transfer, dispose of, or encumber any personal property of the project, including rents, or pay out any funds except from surplus cash, except for reasonable operating expenses and necessary repairs."

⁵ Para. 8(g) of the Regulatory Agreement provides in pertinent part that "Any funds collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all times equal or exceed the aggregate of all outstanding obligations under said account."

⁶ Gov't counsel notes that Respondent Noah admitted to the violation in his response to the OIG Report of June 29, 2006. See Gov't Ex. 28 at p.14.

“cash deficiency of \$12,501.00.”⁷ Additionally, counsel argues that Village did not make the transfer after the close of the fiscal year and did not obtain HUD’s approval for the transfer.⁸ Additionally, counsel argues that because “HDCDC was also the management agent and principal of the owner of Wellston Townhouses, it violated Village’s Regulatory Agreement by receiving and retaining assets of the project at a time when it was not in a surplus position, and not made at the end of Village’s fiscal year.”

In arguing for Respondents’ debarment, counsel asserts that Townhouses and HDCDC as entities managing or owning FHA insured projects covered by Regulatory Agreements were participants in HUD/FHA mortgage loan insurance transactions. Similarly, Respondent Noah, in his capacity as president, thus a principal of a company owning or managing multifamily properties insured and regulated by HUD, was a principal in FHA mortgage loan insurance transactions. Accordingly, the Respondents are subject to the debarment regulations at 2 CFR part 180.

Government counsel argues that violations of the projects’ Regulatory Agreements are grounds for debarment under 2 CFR 180.800(b) because the violations demonstrate a willful failure to perform, a history of failure to perform, and a willful violation of a regulatory provision or requirement by Respondents. Additionally, the violations are of so serious and compelling a nature as to demonstrate the Respondents’ lack of present responsibility, and are grounds for debarment under 2 CFR 180.800(d).

Counsel dismisses in the Department’s Post-Hearing Brief Respondent Noah’s assertion at the hearing that he did not participate in or had knowledge of or reason to know of the improper conduct of Townhouses and HDCDC. Counsel notes that Respondent Noah did not challenge the Government’s evidence that he participated in covered transactions, that the Government’s evidence established a cause for debarment, that he should be debarred if the acts of misconduct can be attributed to him, or that a three-year debarment is appropriate.

Counsel also argues that Respondent Noah’s claim that he was merely a member of the Board of HDCDC and was not involved in the projects’ daily activities is baseless. Counsel makes reference to several documents submitted as exhibits to the Department’s Post-Hearing Brief⁹. These documents, counsel argues, demonstrate Respondent Noah’s

⁷ Gov’t Ex. 30, cited by counsel as evidencing the deficiency, shows in the Statement of Cash Flows Increase (Decrease) in Cash Year Ended August 31, 2004, that the project had \$3,115.00 “Cash in Bank – Operating – End of Year.”

⁸ Para. 8(e) of the Regulatory Agreement provides that “Owners shall not without the prior written approval of the Secretary . . . (e) Make or receive and retain, any distribution of assets or any income of any kind of the project except surplus cash and except on the following conditions: (1) All distributions shall be made only as of and after the end of a semiannual or annual fiscal period.”

⁹ Among the documents Government counsel refers to as supporting his argument of Noah’s active involvement in the projects’ activities are an MHDC regulatory document that Noah signed in 1978 as the HDCDC corporate secretary, Noah’s listing on a 2003 HDC Retirement Village Rent Schedule as president, a HUD fax listing potential management agents on which he was copied, a 2004 letter to HUD signed by Noah as “director” on HDCDC’s letterhead submitting a “plan to correct the problems cited in [HUD’s] letter of April 2 on” Wellston, a May 7, 2004, letter to Noah from HUD denying his request for

“active role in the ownership and management of Wellston and HDC Retirement Village.” Counsel continues that the “misconduct of the projects’ ownership and management entities, Townhouses, Ltd. and HDCDC, can and should be imputed to [Noah] since he actively ‘either participated in, had knowledge of, or reason to know of the improper conduct.’”

In arguing for an appropriate term of debarment, counsel summarizes Respondents’ actions, described as their abuse of HUD programs by failing to follow HUD’s directions regarding the hiring of responsible management, and misusing project as well as tenant funds, and compares them to similar actions for which other Respondents were debarred for varying terms. Counsel concludes that Respondents have offered no apologies for their wrongdoing, and their “past conduct demonstrates a lack of present responsibility and a three-year debarment is warranted.”

RESPONDENT’S ARGUMENTS

Respondent Noah testified that he was an unpaid volunteer Board member who took over when the Executive Director of HDCDC, Joseph Brown, died.¹⁰ Respondent further testified that all the matters raised in the OIG audit relate to matters that occurred before he took over the management operations of the projects. However, during the OIG audit, management supplied as much information as they could, and all the OIG findings have been resolved. According to the Respondent, he had to manage the project because no one else could.

In Respondent’s Brief, Respondent notes that the “Board did not run the day-to-day operations of the organizations [and that i]t was not until the Executive Director died¹¹ that [he], a community volunteer, became involved in the day-to-day operations.”

Respondent argues that the Government’s allegation that Townhouses Ltd. failed to abide by the Regulatory Agreement in not replacing HDCDC as the management agent as directed by HUD is without merit. Respondent argues that the delay in replacing HDCDC resulted from Townhouses appeal of the decision to remove HDCDC and the “difficulty identifying an agent willing to manage the project.”¹² Respondent adds that the HUD directive “was followed as soon as Townhouses could engage a new management.” In 2005, Respondent Noah executed a management contract with Majestic Management, LLC.

the approval of a corrective action plan for Wellston, a December 13, 2004, letter from HUD to Noah advising him that he was “in violation of the Regulatory Agreement” for Wellston, etc.

¹⁰ It is noted that Brown was signing documents or being addressed in official HUD correspondence as late as January 2004. See, e.g., Gov’t Ex. 6. Resp. Ex. A states that “Brown was too ill to continue the daily management of the corporation and died in October 2005.”

¹¹ Resp. Ex. A indicates that in 2000, Mr. Brown began “to have major health problems.”

¹² In an unsworn and unsigned typewritten note attached as Resp. Ex. A, which, according to Respondent’s Brief at p. 4, is a statement from Herman Noah, Noah states that they were ordered “to have an outside management company and when we interview [sic] them that [sic] all turned us down because that [sic] thought the local HUD staff was trying to sabotage the projects.” No corroborating evidence or documentation was proffered to support Noah’s claim.

Respondent Noah, in responding to HUD's allegations of improper payments, argues that he was unaware of the payments at the time they were made, "and had no involvement in their creation." In his unsigned note marked as Exhibit A of Respondent's Brief, Respondent Noah writes that he "was not involved in the daily management or approval of accounting of the project and feel[s] as a board member [he] should [not] be disbarred for actions that [he] had not [sic] control over." Respondent further contends in his brief that "when he assumed responsibilities of attempting to rectify the allege[d] deficiencies he in the government's eye then became the sole responsible party." With respect to the Government's contention that the alleged wrongdoings of Townhouses and HDCDC are imputable to him, Respondent asserts that he did not participate "nor did he have any knowledge at the time of the alleged improper acts of the organizations he served on a volunteer basis."

Respondent concludes that for the reasons stated above, he should not be debarred.

FINDINGS OF FACT

1. Respondent Noah, during all relevant times, served as president, vice president, treasurer, or director of HDCDC, a company that had an ownership interest in or managed two FHA-insured properties, Wellston Townhouses and HDC Retirement Village.
2. Townhouses, Ltd. was a limited partnership that owned Wellston Townhouses with HDCDC as the corporate general partner.
3. HDCDC entered into two separate Regulatory Agreements with HUD on behalf of the two FHA-insured properties.
4. Both Regulatory Agreements were witnessed by Respondent Noah at the time of their execution.
5. HDCDC, as management agent for the properties, and pursuant to the Housing Management Agreements it signed with Townhouses, Ltd. and HDC Retirement Village, respectively, was required to comply with all pertinent requirements of the respective Regulatory Agreements.
6. Both Regulatory Agreements required, among other things, the written approval of the Secretary before an owner could make a distribution of assets or income of the property, with the exception of a distribution from surplus cash.
7. At all relevant times, neither Wellston nor HDC Retirement Village was in a surplus cash position.
8. In a letter dated September 12, 2003, pursuant to the Regulatory Agreement, HUD notified Townhouses, Ltd., the owner of Wellston Townhouses, that it had thirty days to replace HDCDC as its management agent.
9. The HUD letter was addressed to the Executive Director, Joseph Brown, who subsequently filed an appeal on December 31, 2003, of the replacement decision.
10. In a January 27, 2004, letter to George Brown denying his appeal, HUD directed him to obtain a new management agent by March 1, 2004.
11. HDCDC replaced itself a year later with Majestic Management, LLC.

12. The HUD OIG conducted an audit of the properties' operations and made several findings, as detailed below, that required corrective action by HDCDC and Townhouses.
13. Townhouses, acting through its general partner, HDCDC, gave HDCDC \$5,453.00 in unearned management fees, which HDCDC undertook to repay as soon as possible.
14. Townhouses paid the water bill for Grandview Apartments, an unrelated entity, from Wellston's funds.
15. Townhouses underfunded its tenant security deposit account for Wellston.
16. Townhouses retained rent payments from tenants that were in excess of the amounts owed under the HAP Contract.
17. HDCDC withdrew \$7,000.00 in November 2005 from HDC Retirement Village Tenant Security Deposit Account for deposit to HDC Retirement Village Rental Account.
18. Respondent Noah responded to the OIG audit, indicating that some of the findings have been resolved.
19. HDCDC on May 20, 2004, transferred \$4,229.00 from HDC Retirement Village Rental Account to Wellston Townhouses.
20. The Executive Director of HDCDC, Joseph Brown, died in October 2005, and Respondent Noah, by his own admission, became involved in the day-to-day operations of the properties.

CONCLUSIONS

Based on the above Findings of Fact, I have made the following conclusions:


1. Respondents were participants in a covered transaction as defined in 2 CFR part 180.
2. Respondent Noah, though a Board member of HDCDC at all relevant times, assumed day-to-day operational responsibility for the properties in October 2005, after the death of the Executive Director.
3. The evidence shows, however, that even before Respondent Noah assumed the responsibilities of the late Executive Director, he was involved in the management and ownership of HDCDC and Townhouses, Ltd. and the two properties they controlled.
4. The evidence does not support the conclusion that Respondent Noah was directly involved in or participated in the specific acts of wrongdoing that form the basis of the findings made in the OIG report or in the violations of the Regulatory Agreements with respect to the improper financial transactions discussed above.
5. The evidence supports the conclusion that Respondent Noah was fully aware of the problems being experienced by the properties.
6. No evidence was adduced by the Government, including Board minutes, to show that Respondent Noah voted for or approved of or participated in any of the improper financial transactions found by the OIG.

7. The evidence is unchallengeable that Respondents HDCDC and Townhouses, Ltd. violated their Regulatory Agreements with HUD and engaged in the improper conduct found by the OIG.
8. Respondents produced no evidence to show what, if any, efforts they made to find an acceptable management agent that would justify a delay of a year in replacing HDCDC as the management agent for their properties.
9. In mitigation of Respondent Noah's conduct, I have considered that Executive Director Joseph Brown developed major health problems in 2000 until his death in 2005, thereby requiring someone to assume his duties during his absence. Respondent Noah, who had served HDCDC since 1978 as a volunteer, assumed responsibilities not usually associated with a Board member to ensure the continued functioning of HDCDC.
10. The violations of the Regulatory Agreements by Respondents HDCDC and Townhouses, Ltd. are cause for debarment in accordance with 2 CFR 180.800(b)(1), (2), and (3).
11. HUD has established a cause for debarment against Respondents HDCDC and Townhouses, Ltd. and has satisfied its burden to prove that the cause exists pursuant to 2 CFR 180.850 and 855.
12. HUD has not met its burden to prove by a preponderance of the evidence that a cause for debarment exists against Respondent Noah.
13. HUD has not met its burden to show that Respondent Noah "either participated in, had knowledge of, or reason to know of, the improper conduct" of the other Respondents so as to impute the conduct to Noah, pursuant to 2 CFR 180.630(b).
14. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
15. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined to dismiss the proposed debarment against Respondent Noah. I have determined in accordance with 2 CFR 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondents Human Development Community Development Corporation and Townhouses, Ltd. for a period of three years from the date of this Determination. Respondents' "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 7/18/08


Henry S. Czauski
Debarring Official